# UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 11-1661

FRIENDS OF THE NORBECK, et al,

**Plaintiffs - Appellants,** 

v.

U.S. FOREST SERVICE, et al,

**Defendants - Appellees,** 

and

STATE OF SOUTH DAKOTA and JEFFREY VONK,

**Intervenors - Appellees.** 

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

THE HONORABLE JEFFREY L. VIKEN United States District Court Judge

APPELLEE-INTERVENOR'S BRIEF

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## SUMMARY AND REQUEST FOR ORAL ARGUMENT

This appeal concerns a USFS decision authorizing prescribed burning and other vegetation treatments in the Norbeck Wildlife Preserve in the Black Hills National Forest.

Appellants are public interest groups. They raised several issues before the District Court, three of which are involved in the present appeal. The first claim is that a state/federal consultation document referred to in the USFS decision should have been independently subject to review under NEPA, 42 U.S.C. 4321, et seq. The second claim is that the USFS decision violates the Norbeck Organic Act (16 U.S.C. § 675, et seq.), a 1920 law establishing the Preserve for the "protection of game animals and birds." Finally, they claim that portions of the USFS decision addressing the extent of mountain pine beetle infestation in the Preserve and its effects on wildlife were not sufficiently supported by the administrative record.

The District Court dismissed Appellants claims, finding that (a) they failed to exhaust the first claim and lacked standing, (b) the USFS decision was proper under Norbeck Organic Act, and (c) the USFS decision was supported by its record. Appellants are seeking to reverse the District Court and the USFS decisions. The State supports the USFS.

Oral argument of no more than 15 minutes is requested.

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#### JURISDICTIONAL STATEMENT

The State does not dispute Appellants' statement that jurisdiction is properly before this Court. As addressed below, however, the Appellants lack standing on Issue I.

## PRELIMINARY STATEMENT

This is an administrative appeal from the Record of Decision (ROD) issued by the U.S. Forest Service (USFS) for the Norbeck Wildlife Project (Project) in the Norbeck Wildlife Preserve (Preserve), a part of Black Hills National Forest (BHNF). Appellees State of South Dakota and Secretary Vonk intervened below and are jointly referred to as "State" herein. The administrative record is cited as "AR." The Appellees' joint appendix is referred to as "JAA." Documents in the District Court record are referred to by docket number (Doc.\_\_). Appellants' Brief is referred to as "Applts. Brf." USFS terms are in a glossary at JAA 502.

#### STATEMENT OF LEGAL ISSUES

I. WHETHER THE FOCUS SPECIES DOCUMENT IS PROPER UNDER NEPA?

Central S.D. Cooperative Grazing Dist. v. Sec'y of U.S.D.A., 266 F.3d 889, (8th Cir. 2001)

2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States and for other purposes, Pub. Law No. 107-206, Section 706 (Aug. 2, 2002)

National Environmental Policy Act, 42 U.S.C. §§ 4321-4370

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Sierra Club-Black Hills Group v. U.S. Forest Service, 259 F.3d 1281(10th Cir. 2001).

II. WHETHER THE USFS PROPERLY AUTHORIZED THE PROJECT IN LIGHT OF THE NORBECK ORGANIC ACT.

Norbeck Organic Act, 16 U.S.C. § 675, et seq.

Sierra Club-Black Hills Group v. U.S. Forest Service, 259 F.3d 1281 (10th Cir. 2001).

III. WHETHER THE USFS DECISION IS SUPPORTED BY THE RECORD?

Central S.D. Cooperative Grazing Dist. v. Sec'y of U.S.D.A., 266 F.3d 889, (8th Cir. 2001)

## STATEMENT OF THE CASE

On March 27, 2010, the USFS issued its Record of Decision (ROD) for the Project. JAA 162. The Appellants lodged appeals, and on July 14, 2010, the Forest Supervisor upheld the ROD. AR-N22357, AR-N22375.

On September 3, 2010, the Appellants filed suit in the District of Colorado.

Doc. 1. On October 10, Appellants filed a Motion seeking a Preliminary

Injunction. Doc. 12. On October 12, the State moved to Intervene. Doc. 15.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> The State is interested because: (a) the State has the statutory and public trust responsibility to protect and manage wildlife throughout South Dakota (including game in and out of the Preserve) under SDCL 41-3-1, SDCL 41-3-3, SDCL 41-3-8, SDCL 41-1-2, and SDCL 41-1-1(12), (b) the State-owned Custer State Park consists of 71,000 acres within and adjoining the Preserve, and (c) the State is responsible for fire protection within and without the Preserve under state law and has contractual obligations for fire suppression on federal property. 16 U.S.C. § 2101(7); SDCL 41-20-4; SDCL 41-20-8; SDCL ch. 34-35.

Upon motion by the USFS (Doc. 9) the case was transferred to the District of South Dakota on October 18. Doc. 19. South Dakota District Judge Viken allowed the State to Intervene. Doc. 28.

After a hearing, the District Court denied the request for preliminary injunction on December 10. Doc. 69. The District Court entered its decision upholding the USFS on January 28, 2011. Doc. 71. The Appellants lodged their appeal on March 18, 2011.

#### STATEMENT OF FACTS

The Preserve was created in the early 1900's, pursuant to the Norbeck Organic Act (NOA). Act of June 5, 1920, 41 Stat. 986 (16 U.S.C. § 675, et seq.). NOA provides for the area to be "set aside for the protection of game animals and birds" and "to be recognized as a breeding place therefor." 41 Stat. 986.

The range of wildlife habitat declined as forested areas in the Preserve became dense and pine encroached into meadows, stands of hardwood and shrubs. JAA 166. In the 1970's and 1990's the USFS attempted to remove encroaching pine as well as to provide for a variety of stand ages and densities in conifer communities. *Id.* Lengthy court battles ensued. *Id.* The 1990's effort concerned projects in the Needles and Grizzly areas of the Preserve. *Sierra Club-Black Hills Group v. U.S. Forest Service*, 259 F.3d 1281 (10th Cir. 2001). Little vegetation

management occurred in the Preserve between the 1960's and the early 2000's.

JAA 166.

In the meantime, in the Beaver Park area elsewhere in the BHNF, an infestation of mountain pine beetles increased to the point where emergency action was required. In 2002 Congress stepped in by enacting Section 706 in the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States and for other purposes, Pub. Law No. 107-206, (Aug. 2, 2002) (Addendum to this brief). Section 706 implemented the Needles and Grizzly sales immediately due to concerns over fire suppression and fire danger. *Biodiversity Associates v. Cables*, 357 F.3d 1152 (10th Cir. 2004). Section 706 also required consultation with the State for the Preserve.

Project Summary. The main focus of the Project is on improving habitat for game animals and birds. JAA 170-71 (ROD). The Project was also originally designed to reduce risk and consequences of fire in the Black Elk Wilderness (BEW), but the BEW part was deferred. *Id*.

It is important to review what the Project does (and does not) involve. The Project tailors forest management to the types of game birds and animals that inhabit the Preserve. It does not destroy virgin forest. This area has not been logged for a considerable period due to repeated appeals, but areas of the Preserve have been logged in the past. JAA 166.

Further, the Project planning area includes the whole Preserve, but not all trees are to be logged. As seen by the maps in the Addendum, the largest part of the Preserve is the BEW; it was not even considered for logging. Prescribed burning for the BEW has also been deferred. JAA 177. As for the rest of the Preserve, there are various treatments, including prescribed burning, mechanical treatments or both. Ultimately, out of the over 26 thousand acres, about 6000 acres will be treated. JAA 164, 175. As seen by the mapping (and the discussion *infra*), the Project was subject to meticulous review so that the game animals and birds using those areas would be benefited.

The Project (modified Alternative 4) provides for enhanced habitats for the following species and other species similarly situated: mountain goat, Rocky Mountain bighorn sheep, Rocky Mountain elk, white-tailed deer, Merriam's turkey, mountain bluebird, golden-crowned kinglet, brown creeper, ruffed grouse, song sparrow, northern goshawk, and black-backed woodpecker. JAA 169 (ROD), JAA 219-20, 248-49.

Briefly stated, the Project provides for:

1) Enhancing shrub habitat for species such as elk, white-tailed deer, turkey and song sparrow. This includes removing pines around shrub sites on 52 acres and following up with prescribed burns. JAA 172, 175 (ROD).

- 2) Enhancing spruce habitat for species such as brown creeper and golden-crowned kinglet. JAA 172 (ROD).
- 3) Enhancing hardwood habitat for species such as ruffed grouse, elk, white-tailed deer, and song sparrow. *Id.* This will remove conifers larger than 9 inches dbh<sup>2</sup> in 620 acres, but will leave conifers greater than 20 inches dbh in 100 foot boundaries surrounding these hardwood areas (and in 3 specified stands totaling 95 acres). This also includes prescribed burning in about 220 acres. *Id.*; JAA 175 (ROD).
- 4) Enhancing meadow habitat for species such as elk, white-tailed deer, turkey and bluebirds. This includes removing conifers larger than 9 inches dbh in 132 acres of meadow sites (except trees greater than 20 inches dbh in 100 foot boundaries surrounding these treated meadow sites). This also includes removal of conifers in another 139 acres where all trees of less than 20 inches dbh are to be removed. This also involves prescribed burning in over 276 acres. JAA 172-73, 175 (ROD Table 5).
- 5) Enhancing large tree habitat in 901 acres for species such as brown creeper, turkey, goshawk and black-backed woodpecker by removing trees of less

<sup>&</sup>lt;sup>2</sup> Dbh is a standard term referring to diameter at breast height. It means the diameter of the main trunk at 4 foot 6 inches. JAA 505.

than 9 inches dbh to reduce competition and allow large trees to thrive. JAA 173. This includes a combination of thinning trees and prescribed burning. *Id*.

- 6) Accomplishing stand diversity treatments in 2,947 acres to benefit species such as mountain goat, elk, white-tailed deer, bighorn sheep, turkey, goshawk, ruffed grouse, and back-backed woodpecker. These treatments thin specific areas to provide for diversity in tree sizes, spacing, and ages. *Id.* This also includes prescribed burning. *Id.*
- 7) Enhancing forage on 531 acres for species such as mountain goat, bighorn sheep, elk, white-tailed deer and turkey. JAA 173-74. This involves clear-cutting several patches (totaling 76 acres) to create open areas, reducing density of pines in 43 acres and prescribed burning. *Id*.
- 8) Enhancing late succession habitat to benefit brown creeper, goshawk, turkey and black-backed woodpecker on 501 acres. JAA 174. This involves thinning. For 200 acres, the result will be dense un-thinned groups of ponderosa pine interspersed with openings, hardwood inclusions and thinned areas. *Id.* The other 300 acres involves thinning trees under 6 inches dbh with various spacing between residual trees, leaving ample understory pine. *Id.*

The Project will minimize impacts during the nesting, fawning, and calving periods by allowing timber harvest and other mechanical treatments only during

the period from August 1 to February 28 (outside birthing and nesting periods).

JAA 174, 181-82.

The Project will provide not only for improved habitat for game animals and birds at present, but also will maintain, enhance, and protect habitats for the future that will be more resilient and withstand disturbances such as insect infestations and wildfire. JAA 183.

## Mountain Pine Beetle (MPB).

From the USFS perspective, "reducing MPB susceptibility is a secondary benefit from [the Project], not a primary purpose." JAA 180. However, the MPB infestation was a factor to be considered.

The ROD recognized, based on study by USFS Scientists, that the range of potential habitats available to game animals and birds will be negatively affected by the MPB outbreak by 2020. JAA 178. The ROD found that to improve the range of habitats, active management is required. *Id*.

The pervasive MPB infestation in the Preserve is well documented. Allen, Kurt and Daniel F. Long, *Evaluation of Mountain Pine Beetle Activity* (2010) (JAA 603); Allen, Kurt, *Consequences of the No Action Alternative and Effects of Treatments in the Norbeck Area* (2009) (JAA 612); Schaupp, Willis C. *Aerial Overview Detection Survey in 2009, Black Hills of South Dakota and Wyoming*, (2009). JAA 615-20.

Allen's field study reported an extreme situation already in 2007:

The number of trees killed per acre found in parts of Norbeck/Black Elk Wilderness<sup>3</sup> is extremely high. Certainly there are large portions of the wilderness that already have 100% mortality of the pine overstory and this level of mortality is expected to continue in the near future As the survey data show 60% of the dead trees encountered this fall are still green but dead and infested and will produce new beetles in 2008. In parts of the area this number is much higher . . . .

Mountain pine beetle is at outbreak proportions in the Norbeck area. Significant changes on the landscape have already occurred and these changes will continue to occur into the future . . . The final totals for mortality in Norbeck have already equaled or surpassed the 50% level in moderate or high risk stands, some reaching 100% mortality and the mortality is still growing and expanding.

JAA 609-10. Allen's 2007 analysis recommended treatment as soon as possible, including removing infested green trees and trimming dense areas of pines to reduce potential of MPB from moving from tree to tree.

JAA 610.

In 2009, during NEPA review, Allen round that there were already "[e]ntire stands killed in a few years. Based on the amount of currently infested trees present, this type of mortality is going to continue to increase and spread through the project area." JAA 613. He found, however:

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<sup>&</sup>lt;sup>3</sup> Although parts of the Congressionally designated BEW portion of the Preserve were originally proposed for treatment (prescribed burning), the USFS deferred that facet. JAA 177-78.

stands where there has been some thinning and treatment in them have the best chance of being maintained. The treatments that have been done and are proposed around the edges of the wilderness could be effective in maintaining some stands of mature pine. Most of the proposed treatments should be highly effective at reducing beetle caused mortality . . . . They may also be effective at helping to protect some stands that are desired to be left at a higher densities. Considering the large and growing beetle population in these areas, the sooner these treatments are done, the better the chance they have of being effective.

JAA 614. He concluded that "if no action is taken, it is easy to envision that many of the areas that are forested at this point could easily lose most or all of their mature pine overstory." *Id.* 

The Project will use variations of logging, thinning and spacing because these treatments improve habitat for game animals and birds. Thinning is also expected to reduce the likelihood of 100% tree mortality in Project areas that are not yet infested (but would soon be subject to MPB spread). JAA 610-614.

Fire risk. The Project provides not only for improved habitat for game animals and birds at present, but also improved habitat in the future. The habitat is expected to better withstand disturbances such as insect infestations and wildfire.

JAA 183 (ROD).

MPB and wildfire issues are related. MPB infested areas are more susceptible to fire than other areas. JAA 395 (FEIS). Crown fire<sup>4</sup> hazard is higher in MPB-affected stands during the 2-3 years post-outbreak. *Id*.

The record shows the Preserve has an overall hazard rating of high to very high in about 81% of its area (exclusive of the BEW, a non-treatment area, where the damage is higher yet). JAA 396; JAA 635 (Fire/Fuels Specialist Report). Areas with high fire hazard ratings can exhibit more extreme fire behavior with more severe effects than those with low hazard rating. JAA 633.

The average size of large (> 20 acres) fires on BHNF lands that escape initial attack are large (average size 8000 acres) and difficult to control. JAA 629-631. These escaped fires have burned about 239,000 BHNF acres since 1980. *Id.* For comparison, the total BHNF is 1.24 million acres. JAA 112. The Jasper Fire in 2000 consumed 83,508 acres (79,400 within the BHNF). AR- N19451. The fire spread rapidly, overcoming suppression efforts, and exploding at record rates of 100 acres per minute. *Id.* During its largest growth period, it spread at rates of 20 mph. JAA 393. The 1988 Galena wildfire burned 16,670 acres, including hundreds of acres in the Preserve (and Custer State Park). JAA 392.

<sup>&</sup>lt;sup>4</sup> A crown fire is one that burns in canopy fields, i.e. a fire that burns in the upper part of the tree and moves rapidly from treetop to treetop. JAA 504, 633.

The likelihood of these fires is not only a danger to human life and property within<sup>5</sup> and without the Preserve<sup>6</sup> and on other federal property<sup>7</sup>, but they also cause dramatic changes in wildlife and wildlife habitat. The Jasper fire killed most of the vegetation for thermal and hiding cover for wildlife in about 80% of the area affected. JAA 752 (Jasper Fire Assessment). Thousands of acres shifted from habitat for forest-dwelling species to that suitable for early successional forest and meadows. JAA 756. The fire consumed elk and deer birthing habitat, brood rearing habitat for Merriam's turkeys, and other wildlife habitat. *Id.* Seven of ten goshawk nest stands were completely burned and will not be suitable nesting habitat for many years. JAA 754. Some animals died or were stressed, including mountain lion, deer, squirrels, turkeys, chipmunks and elk. *Id.* 

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<sup>&</sup>lt;sup>5</sup> In addition to USFS land, there are 6,826 acres of non-federal lands within the boundaries of the project area. JAA 164, 217. This includes part of the state-owned Custer State Park as well private homes and businesses. There are 225 structures within the Project boundary that could be impacted within the first few hours of a fire and thousands more in the first 12 hours. JAA 393 (FEIS).

<sup>&</sup>lt;sup>6</sup> These are rural private homes in forested areas outside the Preserve boundaries, as well as 4 nearby communities that would be at risk: Custer, Hill City, Keystone, and Hayward. JAA 220 (FEIS). The portion of Custer State Park adjacent to the Preserve would be at risk. *Id.* CSP is the Preserve's largest neighbor and includes a historic game lodge used as the summer White House by President Coolidge and other historic lodges and structures in addition to extensive wildlife and other resources. AR-N21721-N21724.

<sup>&</sup>lt;sup>7</sup> Mount Rushmore National Memorial and Upper Pine Creek Research Natural Area. JAA 220.

Against this background, Appellants demand that the USFS do nothing.

#### STANDARD OF REVIEW

The State relies on the Standard of Review argued by the USFS for each issue.

## **SUMMARY OF ARGUMENT**

The USFS Norbeck Project results from lengthy analysis by seasoned scientific professionals and is tailored to protect "game animals and birds" under the Norbeck Organic Act, 16 U.S.C. § 675. It provides for prescribed burning, thinning and other treatments as warranted for each type of habitat (i.e., hardwood, riparian, dense pine) to protect each type of game animal and bird species using that habitat.

Thinning dense pine stands will reduce the current outbreak of MPB infestation, provide for resilient stands in the future, and maintain habitat now and in the future. Reducing tree mortality from MPB will reduce the likelihood of large, intense wildfires and concomitant lost habitat for game animals and birds. Further, the Project will remove encroaching pines from meadows, hardwood stands and riparian areas in order to benefit game animals and birds that use such habitat.

The Project meets or exceeds environmental requirements, including not only the Norbeck Act, but also NFMA (16 U.S.C. 1604, et seq.) and NEPA (42

U.S.C. §§ 4321-4370) to the extent they are applicable. The Court lacks jurisdiction, however, on Appellants' claim that a state/federal consultation document (Focus Species document) was subject to NEPA. In 2002 Congress exempted state/federal consultation documents regarding the Norbeck Preserve from review. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. Law No. 107-206, § 706 (Aug. 2, 2002).

#### **ARGUMENTS**

I

THE FOCUS SPECIES DOCUMENT IS PROPER AND APPELLANTS' NEPA CLAIMS DO NOT WARRANT RELIEF.

Appellants claim that the USFS erroneously relied on the 2007 Focus Species document. The arguments should be rejected.

## 1. Standing.

Appellants claim the USFS failed to subject the Focus Species document to NEPA analysis. In order to raise an issue in an administrative appeal, the Appellant must first raise the matter to the agency. *Dep't of Transp. v. Pub.*Citizen, 541 U.S. 752, 764 (2004). The Eighth Circuit has succinctly stated "we need not consider arguments a party failed to raise before the agency." *Central*S.D. Cooperative Grazing Dist., 266 F.3d at 901 (8th Cir. 2001).

Comments to the Draft EIS, Appellants asked the USFS to consider other focus species and address other information, but did not claim the Focus Species document itself should have undergone NEPA review. AN-N04404-N04999.

Appellants also failed to meet specific exhaustion requirements under the USFS procedural provisions. 7 U.S.C. § 6912(e); 36 C.F.R. § 215.21. The NEPA claim should be rejected.

## 2. <u>Section 706</u>.

Section 706 was developed in 2002 after the BHNF experienced repeated wildfires that were fueled by dead and dying MPB infested trees. Fires were out pacing pending lawsuits and settlement negotiations in the BHNF. *Biodiversity*, 357 F.3d at 1157-60. Congress found that "forest health conditions within the Beaver Park area [in the BHNF outside the Preserve] and Norbeck Wildlife Preserve within [the BHNF] are deteriorating and immediate action to treat these areas is in the public interest." Section 706(a)(1). Congress further found that pending litigation "prevents timely action to reduce the risk of wildfire in the Norbeck Wildlife Preserve." Section 706(a)(3).

Section 706 was a compromise. It not only jump-started forest management activities, it added 3,600 acres to the BEW within the Preserve, causing a permanent management change over those 3,600 acres. Section 706 (1)(a)(6).

Section 706 was unique in adding wilderness area in exchange for allowing the USFS to proceed with forest management. 148 Cong. Rec. S 8414 (daily ed. Sept. 10, 2002) (statement of Senator Reid). Wilderness designations come "by inches" and are difficult to accomplish in Congress. *Id*.

Among the provisions in Section 706, Section 706(i) required the USFS to:

propose a Memorandum of Understanding with the South Dakota [GFP]to at a minimum, adopt procedures to monitor the effects of management activities, consult on habitat management, concur on program areas of responsibility, and review and recommend as needed any changes to the Norbeck Wildlife Preserve direction contained in the 1997 Revised Forest Plan and future Plan amendments and revisions.

Significant to the issue here, Congress provided that NEPA and NFMA<sup>9</sup> would not apply to any actions in Section 706 (including the foregoing consultation process):

<sup>&</sup>lt;sup>8</sup> The Wilderness Act provides: A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S. C. 1131-1136. Humans are restricted to non-motorized recreation (such as backpacking, hunting, fishing, and horseback riding), scientific research, and other non-invasive activities. The law generally prohibits logging, mining, roads, and mechanized vehicles. Its protection and boundary can only be created or altered by Congress. *Id*.

Due to the extraordinary circumstances present here, actions authorized *by this section* shall proceed immediately and to completion notwithstanding any other provision of law including but not limited NEPA and the National Forest Management Act (citation omitted) and the Appeals Reform Act (citations omitted). Any action authorized by this Section shall not be subject to judicial review by any court of the United States.

Section 706(j) (emphasis added). This language exempts all actions taken under Section 706 from NEPA and NFMA (and from judicial review), not just the part pertaining to timber sales in the pipeline at the time.

In response to Section 706(i), the USFS and the State entered into a MOU in 2004. JAA 019. In order to consult about the Preserve, the parties found they needed to identify the types of "game animals and birds" to monitor and address. JAA 052. They developed the Focus Species document in 2007. JAA 048. Consistent with the ongoing consultation requirements of Section 706(i) the State and the USFS entered into a modified MOU incorporating the Focus Species list. JAA 104. The Focus Species document is contemplated by Section 706(j) and is exempt from review.

# 3. NEPA is not otherwise implicated.

NEPA compliance is required under NFMA for two phases of USFS planning: Forest Plans and site-specific activities. *Central S.D. Cooperative Grazing Dist.*, 266 F.3d at 892-93 (8th Cir. 2001). Forest plans establish "overall

<sup>&</sup>lt;sup>9</sup> National Forest Management Act. 16 U.S.C. 1604, et seq.

management direction for a forest unit for ten to fifteen years" and serve as a "programmatic statement of intent" for "future site-specific decisions." *Id.* NEPA compliance is also required for site-specific plans that actually implement the Forest Plan. *Id.* 

Guidance documents that do not "propose any site-specific activity" and that do not "call for specific actions directly impacting the physical environment" do not trigger an obligation under NEPA. *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998). The Focus Species document is a guidance document.

Further, the Focus Species document is not a "major federal action affecting the quality of the human environment "as would be required to trigger NEPA. 42 U.S.C. § 4332(2)(C). It does not purport to alter the human environment. *Id.* It does not direct a course of action. JAA 053. Appellants argue that the focus list "drives," "directs" or "was the purpose of" the project (Applts. Brf. at 12, 17), but the record says otherwise. The Project is driven by NOA itself (not the Focus Species document). JAA 186.

4. <u>Scientific expertise</u>, <u>professional methods</u>, and <u>public involvement</u>.

The Focus Species document was developed by state and federal biologists who reviewed the history and language of the Norbeck Organic Act, examined

relevant natural resource literature, studied the known species in the Preserve and their habitats, and consulted with other scientists. JAA 024-103.

Indeed, although not required to do so, state wildlife biologist Michele Deisch asked for and received input from wildlife management agencies, professional wildlife affiliations, trappers, sportsmen's groups and conservation and environmental groups. JAA 024-47. The comments were considered. *Id.* 

Appellants claim they were not allowed to participate in this 2007 effort. Based on its Complaint, Friends of the Norbeck was not even in existence until 2008. Doc. 10, ¶ 13. Even so, other entities participated that are aligned with Brian Brademeyer (the principal in Friends of the Norbeck and closely associated with Native Ecosystems Council). JAA 024, 028. In 2006 Brademeyer himself participated in public analyses giving rise to the Focus Species document. AR-N00139. Brademeyer and NEC were apprised of the proposed list and document and could have participated rather than hanging back and creating this appeal issue (or claiming credit for comments filed by others - *see* Footnote 11).

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<sup>&</sup>lt;sup>10</sup> Brian Brademeyer has been a key player in these various groups, including Biodiversity Conservation Alliance, and the Black Hills Sierra Club. *Biodiversity Associates v. Laverty* (Dist. Colo. Docket 99-02173) aff'd sub nom *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1159 (10th Cir. 2004); *Lamb v. Thompson*. (Colo. Docket Colo. 95-02923). He also filed comments on behalf of NEC at other stages of this proceeding. AR-N04260.

Because the 1920 NOA requires the Preserve to be used for "the protection of game animals and birds and as a breeding place therefor," the Focus Species document defines "protection" based on the dictionary and a study of the intent of the framers. JAA 056-057. Protection is defined to as "[t]he controlled use, skill and systematic conservation and management of game animals and birds and their habitats; to protect game animals and birds and their habitats from depletion or the need to preserve individuals." JAA 057. The definition does not assume preservation of individual game animals and birds from predators, whether those predators are human or wild." *Id.* Instead, it "encompasses a conservation/land ethic management system that supports populations of game animals and birds and strives to improve their habitats." *Id.* 

Although Appellants claim the term "breeding place" should have also been defined in detail that was not done because the language itself is apparent.

AR-N09192-N09193. The actual breeding places for each species are evaluated in detail in the Project planning documents. *Id.*; JAA 290-380; AR-N9887 (Wildlife Specialist Report); AR-N10020 (Biological Assessment/Biological Evaluation).

The Focus Species document comports with NOA and the Tenth Circuit's decision in *Sierra Club* in that it is restricted to game birds and animals that actually live and breed in the Preserve. JAA 061. There are, however, many species of "game animals" or "birds" that inhabit the Preserve, so a representative

list was developed. JAA 060. Representatives are used from each type of habitat in the Preserve, i.e. meadows, shrubs, burned areas, snags, riparian areas, dense forest conditions, late succession and other types of habitat. JAA 061. The definitions and list are" part of a living and dynamic process, open to modification." JAA 053. The Focus Species document was not, as more or less suggested by the Appellants, cobbled together without careful thought.

## 5. Mountain lion, pine marten, and pygmy nuthatch claims.

The Appellants claim "Friends and the public" asked the USFS to consider other species when the Focus Species document was created. Applts. Brf. at 16 (lines 1-2) citing AR-N00267, N00273.<sup>11</sup> The species at issue are the mountain lion, "pine" marten and pygmy nuthatch.

a. <u>Mountain lion</u>. The mountain lion was considered, but the main reason for not selecting it is that the lion's limiting factor is prey. JAA 101. It would have been redundant to use this species because its primary prey was already considered—white tailed deer and elk. Other prey on the list includes mountain goats and bighorn sheep. *Id.* Also, the physical habitat necessary for mountain lions (solitude from motorized vehicles and seclusion) was already present in

<sup>&</sup>lt;sup>11</sup> Since they claim credit for such comments, it is apparent the Appellants were "allowed to participate" in the focus species process. They just do not like the result and wish to rehash it during Project planning.

Norbeck regardless of whether the mountain lion was on the list or not. *Id.*Forestry practices that favor the prey favor the mountain lion. *Id. See* also

AR-N13514 (Ph.D. dissertation used in focus species analysis). Listing it would have no more or less effect on forest management than not listing it. *Id.* 

b. American (a/k/a "Pine marten"). The American marten<sup>12</sup> is not a "game animal" or a "bird." It is a carnivorous mammal (weasel) about the size of a house cat. AR-N01725. There is no need for special legal consideration for this species under NOA and no need to include it in the Focus Species list. Also, the marten is primarily devoted to spruce habitat. JAA 038, 099. A different animal found in spruce habitat was chosen for the list, the golden crowned kinglet. JAA 073-074, 099. As a bird, the kinglet is a more appropriate choice to meet the NOA Focus Species list. *Id*.

Although the American Marten is not specifically protected by NOA, that does not mean it has been totally disregarded. The marten was considered elsewhere in the project review under other statutes and rules. NOA is the principal law for project planning for the Preserve, but it is not exclusive. *Sierra Club*, 259 F.3d at 1288-1289.

<sup>12</sup> Although Appellants use the term "pine marten" it is an archaic term for the American marten.

Under NFMA, Forest Service Planning includes consideration of "sensitive species" like the American Marten, a Region 2 sensitive species (R2SS). Sensitive species are those identified by Regional Foresters for which "population viability is a concern." JAA 513. *See also* AR-N00560 (FS Manual 2670.42). The USFS analyzes them in Biological Assessment / Biological Evaluations (BA/BE). *Id.*The BA/BE is a combination document analyzing not only sensitive species under NFMA, but also endangered species, if any are at issue. 19 U.S.C. 1536(c); 50 C.F.R. 402<sup>13</sup>. Under USFS requirements, each BA/BE must examine whether the proposal has an adverse or beneficial impact on sensitive species, and if adverse, determine whether the impact would result in loss of viability in the planning area or cause a cause a trend toward being listed as an endangered species. AR-N00565 (FS Manual 2670.42).

A BA/BE was prepared for the Phase II Amendment to the 1997 Land and Resource Management Plan (2005)(Phase II). AR-N02166, et seq. The marten was among the species considered. AR-N02168, N02412-02420. As such, the USFS has already considered this sensitive species in creating overall management Standards and Objectives for the. JAA 155-158.

<sup>13</sup> No endangered or threatened species are at issue in this case.

Yet another BA/BE was undertaken for the Project itself and the marten was examined then, too. AR-N10033, N10042-N10046.<sup>14</sup> In addition to its own analysis and field work, the USFS relied on several expert studies on the marten that were specific to the Black Hills. AR-N13505.

The BA/BE found there is now a stable population of the marten in the Preserve. (AR-N10033), but if the MPB activity occurs as predicted, the "risk to the marten population within the Norbeck project area is high." AR-N10046. On the other hand, the Project would not be likely to cause a loss of population viability in the planning area. AR-N10045.

Marten habitat includes coarse downed woody material, so the BA/BE recommended that piles of existing woody material be left near ground structure for the prey of these weasels. AR-N10042-10044. This is Forest Standard 3117. JAA 158. The BA/BE also stated that "in areas identified as important connectivity corridors for marten" canopy closure should be maintained under USFS Standard 3215. AR-N10044-N10045. This defers 182 acres of spruce habitat. *Id.* The Appellants claim the USFS did not adopt measures to "improve viability" of the "pine" marten, but the Project is using the above standards.

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<sup>&</sup>lt;sup>14</sup> In addition, the Appellants (and others) offered comments on habitat requirements for species during NEPA review of the Project. This included not only the marten, but several other species including all species they believed to be relevant to NOA's requirements. AR-N09113, et seq.

JAA 526-527. Beyond that, NOA does not require "improved" viability; it requires protection of species. *See The Lands Council v. McNair*, 537 F.3d 981, 995 (2008) (maintaining viability of species habitat is different from improving viability and improving viability is not required unless the authorizing act so provides).

c. <u>Pygmy Nuthatch</u>. The pygmy nuthatch is a small songbird that lives at various places in the western part of the United States. AR-N14163. It prefers dense mature pine forests. AR-N14167.

In creating the Focus Species document, analysts recognized that the pygmy nuthatch is a secretive species and after 5 years of monitoring (2001 -2005), a total of 10 pygmy nuthatches were recorded in a variety of habitats in the Black Hills. JAA 100. This species might be representative of undisturbed late-successional forests that grow dense, but analysts concluded that the brown creeper better represents these late-successional conifer forests. JAA 034-037. Pygmy nuthatches are so secretive and localized that monitoring them for the effects of planning and activities in the Preserve would be unreliable. JAA 035. In other words, habitat changes that affect this type of species would be more evident if the brown creeper was monitored rather than the more secretive pygmy nuthatch.

Although the pygmy nuthatch is not a focus species under NOA, it was not ignored in Project planning. It is a species of local concern (SOLC)<sup>15</sup> under NFMA and was reviewed for the FEIS. AR-N09970-N09971 (Wildlife Specialist Report). This species will lose habitat due to the MPB under any alternative (including the "no action" alternative). JAA 361-362 (FEIS). However, Project treatments to reduce pine encroachment and competition between trees will result in production of larger trees that are more suitable for late successional species like the nuthatch to use for nesting roosting and foraging. JAA 360; AR-N14179.

Further, this species relies on snags (standing dead trees) for nesting and roosting. *Id.* The pending Project will not harvest snags unless they are a safety hazard. JAA 284. The Project would increase the likelihood of large hard snags in the future <sup>16</sup> as opposed to soft snags. Hard Snags remain in place for a longer period than soft snags and provide more long-lasting habitat. AR-N17518.

In sum, the three species Appellants are concerned with were rejected from the NOA Focus Species list because they are not a "game animal or bird" (marten),

<sup>&</sup>lt;sup>15</sup> A SOLC is a USFS locally designated species that does not meet the criteria for sensitive species, but is needed for diversity or has declining populations. JAA 338.

<sup>&</sup>lt;sup>16</sup> Hard snags are "dead or partially dead trees composed primarily of sound wood, particularly sound sapwood." JAA 508. They are from trees that do not die from insect infestation. Soft snags are dead trees in advanced stages of decay and deterioration. JAA 514. The MPB creates soft snags. AR-N17518.

listing them would have been redundant (mountain lion and pygmy nuthatch) and/or information is insufficient to use as a reliable reference for the habitat involved (pygmy nuthatch). The fact that the species were not included in the Focus Species list under NOA itself does not mean that the USFS failed to conduct the appropriate NEPA analysis (or that these species were not considered under other applicable federal laws and rules).

II

THE USFS PROPERLY AUTHORIZED THE PROJECT IN LIGHT OF THE NORBECK ORGANIC ACT.

Under NOA the Preserve is to be used for the protection of game animals and birds and to be recognized as a breeding place for them. 16 U.S.C. § 675.

Although Appellants would prohibit logging, prescribed fire and other vegetation treatments in the Preserve, NOA contains no such prohibition. As the District Court recognized (Doc. 71, p. 11), timber sales and timber harvests are permitted.

16 U.S.C. § 678(a). In 2002 Congress reiterated, in Section 706, that timber sales and a "full spectrum" of management tools is allowed in the Preserve.

Appellants view is contrary to NOA. If forests like the Preserve become monocultures of dense trees (as Appellants prefer) they do not provide for ecologically resilient vegetative communities and are ripe for landscape altering events like crown-fires and MPB epidemics, which convert all impacted acres back to early successional stages. Allowing the majority of the Preserve's vegetation to

be either mostly early or mostly late vegetation is contrary to the need for various habitats and a mix of conditions over time for *all* game animals and *all* birds.

As seen below, each of Appellants six claims should be rejected.

1. <u>At-risk rare birds/Alternative habitat</u>. Appellants claim the Project record is like that in *Sierra Club* where the Tenth Circuit reversed and remanded Norbeck Projects. Applts. Brf. at 24-26. The Tenth Circuit noted that the USFS had not addressed "other available habitats" for "at-risk rare birds." *Id.* at 1288.

First, it is not clear what the Tenth Circuit meant by "rare and at risk" birds. NOA itself does not provide a list. Certainly not all "game animals and birds" are at-risk or rare. The reference to "rare species" indicates the Tenth Circuit may have been referring to the Endangered Species Act (ESA)<sup>17</sup>, but there are no endangered species at issue here.

Other categories of species in the BHNF are based on Forest Management rules and NFMA (as implemented in the BHNF Forest Plan). They are Management Indicator Species (MIS), R2SS, and Species of Local Concern

<sup>&</sup>lt;sup>17</sup> The ESA requires federal agencies to consult with Fish and Wildlife Service (FWS) if a proposed action might jeopardize the continued existence of threatened or endangered species or critical habitat for them. If the FWS finds the proposed action would cause jeopardy to these species, it outlines "reasonable and prudent alternatives" to avoid jeopardy. *Bennett v. Spear* 520 U.S. 154 (1997); *In re Operation of Missouri River Litigation* 421 F.3d 618, 625 (8<sup>th</sup> Cir. 2006).

(SOLC). The Tenth Circuit was concerned with NOA requirements, so it is unlikely to have meant these NFMA species.

Similarly, the Tenth Circuit did not provide a citation for its reference to "other available habitat." There is no such requirement in NOA. It may have also been a reference to the ESA, but there are no endangered species involved in the Preserve, let alone one in jeopardy as would be required to trigger the "reasonable and prudent alternative" requirement of the ESA. The State submits that the language concerning other available habitat for rare and at-risk birds is not a substantive part of the Tenth Circuit's Sierra Club ruling. The reason for remand was that the USFS had relied primarily on NFMA (i.e., broad intent of species diversity) rather than NOA (narrow intent of game animals and birds). The Tenth Circuit did not purport to, and could not have, created a substantive new requirement. See The Lands Council, 537 F.3d at 991 (en banc) (in APA cases, courts err by creating substantive requirements not found in any relevant statute or regulation).

Against this background, Appellants claim "alternative habitat" should have been addressed for the northern goshawk and black-backed woodpecker. The northern goshawk was already subject to thorough habitat analysis on a forest-wide

basis in Phase II. AR-N02392-N02404. As both a MIS<sup>18</sup> and R2SS species, the black-backed woodpecker was also evaluated in the underlying 1997 Forest Plan and Phase II Amendment. AR-N02105, N02168, N02366.

Considering that habitat for these species was addressed in forest wide planning, the extent of additional habitat in the BHNF outside the Preserve was obviously addressed. The current Project is tiered to Phase II, there is no reason to again look at the same alternative habitat now. Even so, both are reviewed below.

a. Northern Goshawk. Goshawks are found in all counties in the Black Hills, not just the Project area. JAA 318 (FEIS); AR-N14898. The USFS and/or State survey each known nesting territory<sup>19</sup> at least annually. *Id.* At least four territories are in ranger districts other than the Project. JAA 675. The BEW has historically had nesting sites (JAA 678) and would provide alternative sites to the extent they are still available after the MPB infestation. This species also nests in Wyoming (AR-N14923, AR-N14905), Nebraska (AR-N14898) and other states throughout the northern and western United States. AR-N08742.

MIS are identified during a planning process "to monitor the effects of planned management activities on populations of wildlife and fish, including those that are socially or economically important." JAA 509. This stems from NFMA which requires Forests to provide for "diversity of plant and animal communities." 16. U.S.C. § 1604 (g)(3)(B). *See The Lands Council*, 537 F.3d at 981.

<sup>&</sup>lt;sup>19</sup> Territories are groups of 2-6 nests. JAA 674.

b. <u>Black-backed woodpecker</u>. Black-backs use various habitats, but prefer the early phases of disturbed habitats, such as recent MPB infested trees and recent burns. JAA 321-324 (FEIS). As such ample habitat has been erupting then diminishing across the entire BHNF for the last 10 – 12 years as MPB moves and progresses and fires occur. *Id*. The MPB is at outbreak levels across many areas of the Black Hills, including the BEW and will continue to provide favorable habitat for the black-backs. JAA 321, 324. There is also an infestation of the MPB in nearby Custer State Park (JAA 287) which provides habitat for black-backs.

Despite Appellants claims that the Project will "remove nearly all of the areas" for black-backs (Applts. Brf. at 25), the statement is unsupported by the reference they cite. Indeed, it is MPB that is likely to destroy most late successional pine species (which provide some but not all habitat for black-backs). The Project itself will not be physically removing all the trees. JAA 172, 173. Habitat for black-backs would be diminished in the future under any alternative as a result of the MPB infestation which creates short-term snags for nesting and only an ephemeral food source. AR-N12084, N12093, N15985.

# 2. <u>16 U.S.C.</u>§ 676 ("Killing Birds").

Appellants claim the Project will kill birds and violate 16 U.S.C. § 676<sup>20</sup>. Applts. Brf. at 26-27. Nonsense. This statute plainly pertains to hunting, trapping and other killing of animals directly by humans. The Project does not change hunting or trapping requirements. JAA 242.

Regardless of Appellants claims, NOA is clearly designed to protect bird species (populations of birds, not individual birds). NOA provides for "protection of the game animals and birds" not prevention of all harm to individual game animals and individual birds. The framers obviously understood the USFS could not prevent all harm to individual birds. As a practical matter, NOA cannot prevent individual birds from dying. They die from natural causes and occasional collisions with vehicles.

To hold that each individual bird is protected would afford at least as much protection to each game animal and bird in the Preserve as is afforded to endangered species, no matter how abundant they are within or without the Preserve.

Bird *species* are protected. The Project will enhance habitats for species by limiting encroachment of conifer trees in hardwood stands, meadows, riparian

<sup>&</sup>lt;sup>20</sup> 16. U.S.C. § 676 provides: When such areas have been designated as provided in section 675 of this title, hunting, trapping, killing, or capturing of game animals and birds upon the lands of the United States within the limits of said areas shall be unlawful except under such regulations as may be prescribed from time to time by the Secretary of Agriculture.

areas, and areas where shrubs and forbs would otherwise exist. JAA 178. Not all the Preserve will be treated; there will be a range of vegetation. Absent the Project, MPB would significantly alter forested areas, diminishing them below the "pine forest" level, increasing the likelihood of wildland fire, and resulting in loss of preferred conifer habitats for birds. The Project will promote habitats or resilience to landscape-altering agents which protects the perpetuation of bird species. *Id*.

Further, to protect nesting birds (and other species rearing young) treatments and related mechanical activities will occur only from August 1 to February 28.

JAA 181-182. Also, special measures will also be implemented to protect the sensitive goshawk (JAA 320, 526), as more specifically discussed *infra*.

Finally, Appellants take snippets out of context from the FEIS regarding various species. Each is discussed below.

a. <u>Merriam's Turkey</u>. Appellants cite to a sentence in the FEIS on the potential effects of prescribed burning on Merriam's Turkey. Applts. Brf. at 26. Wild turkeys are a common and widespread game bird in the BHNF.

JAA 305. They are not rare, at-risk or sensitive. They are plentiful and are hunted in South Dakota. SDCL 41-1-4(4). Design Criteria for the project limits prescribed fire to August 1 - May 1. JAA 524. All burns will be approved by a BHNF wildlife biologist. JAA 529.

If the "no action" alternative had been selected, suitable roosting habitat escape cover would be reduced due to MPB. JAA 305. The Project will retain mature pine stands for roosting and the potential for cover and nesting. JAA 307.

b. <u>Mountain bluebird and song sparrow</u>. Appellants recite to partial sentences from the FEIS on the possible effects of the Project on individual mountain bluebirds and song sparrows. The full FEIS statement reveals that such direct effects would have been due to year-round mechanical treatments. JAA 308. But the ROD ultimately barred mechanical treatments during nesting and rearing seasons. JAA 181-182.

In fact, both species will benefit from the Project. The mountain bluebird prefers open landscapes like meadows, so the enhancement and creation of open areas will be favorable and bluebird populations could increase. JAA 307-308. The primary habitat for the song sparrow (riparian areas with thickets, willows and shrubs) will be enhanced by removing encroaching pines. JAA 315-316.

c. <u>Brown Creeper</u>. Brown creepers occupy mature old-growth conifers and mixed coniferous-deciduous trees, including white spruce. JAA 310. By 2020, the "no action" alternative could displace individual brown creepers to habitat outside the preserve due to MPB mortality in dense old-growth pine. JAA 311-312. Less species displacement will occur when the Project treats high pine densities, thus reducing complete or near complete MPB mortality. JAA 312-

- 313. Project treatments are to maintain some large pine trees, and spruce stands for habitat now and into the future. JAA 313. While the FEIS stated the Project may directly impact individual brown creepers (JAA 312) that issue will be minimized since year round logging won't be allowed after all. JAA 181-182.
- d. Ruffed Grouse. Appellants refer to "potential mortality" of ruffled grouse. Applts. Brf. at 27. The seasonal time restrictions actually adopted ameliorate this concern. JAA 181-182. Further, this game species would be better off with the Project than without. JAA 315. Ruffed grouse depend on aspen. *Id.* Removal of encroaching pine in aspen stands will "improve habitat enough to eventually provide the opportunity for a population increase." *Id.*
- e. <u>Northern Goshawk</u>. Appellants rely on a snippet from the FEIS concerning potential effects on individual birds, but it relates to the year round logging proposal that was never adopted. JAA 181-182, 320. The Project BA/BE concluded there would be no direct effects on goshawks. AR-N10054.

As for habitat, the FEIS found that regardless of the alternative, (including the "no action" alternative), "goshawk habitat is expected to be adversely impacted by the MPB and the risk to the goshawk population in the Norbeck project area is high." JAA 321.

Protective standards prohibit logging in the immediate area of goshawk nests. JAA 190 (ROD), JAA 321. Standard 3108 includes identifying nest areas

of 180 acres around historically active nests and barring treatment in those areas unless it will specifically maintain or enhance the stand for goshawk habitat.

JAA 157. Standard 3111 require minimal noise and disruption within a half mile of any nest during nesting periods. *Id.* Project design criteria includes a 150 foot "No Cut" buffer around nest trees and retains untreated pockets of up to 1/50 acre in size within the nest stand. JAA 526. Although Appellants claim the USFS eliminated goshawk nest protection in the "current forest plan" (Applts. Brf. at 23) that is absolutely not true. The Phase II Forest Plan Amendment required viability assessments specific to the goshawk and enhanced standards for goshawk for the entire BHNF. JAA 157; AR-N01973, N02705, N03275, N03733. *See also Biodiversity Associates*, 357 F.3d at 1158.

Outside the nesting season, the Project will thin pine of less than 6 inches in diameter to keep dense stands as resilient as possible from MPB without removing overstory trees and canopy for goshawk. JAA 182, 320. Due to MPB, limited and selective thinning is necessary to attempt to preserve known goshawk nest stands. JAA 320. As discussed above, MPB infested and killed trees are highly likely to cause or enhance the severity of wildland fires. Wildfire "has the potential to degrade goshawk nesting habitat over an extended period (50 years or more)." JAA 675. The Project and Standards actively prohibit harm to goshawks.

3. Species dependent on older forest habitat.

Appellants claim the USFS should "allow natural succession to occur where habitat is needed for wildlife associated with older forests." Applts. Brf. 27. NOA does not protect overall plant and animal species; it requires protection of "game animals and birds." *Sierra Club*, 259 F.3d at 1288. In other words, it does not protect "older forests" as such.

Appellants allege that logging older dense forest habitat creates "wildlife disturbances" or "deleterious effects" on certain species in contravention of *Sierra Club*. Applts. Brf. at 27. The Tenth Circuit was concerned with *unexplained* USFS statements that "certain species" would be subject to "wildlife disturbances" or "deleterious effects" when species were not identified and the terms "deleterious" and "disturbances" were not defined. *Sierra Club*, 259 F.3d. at 1288. The Project does not involve such a situation. The USFS fully considered each species, explained any limited disturbances due to implementing treatments (mechanical, road work, etc.), and does not violate NOA or Forest Plan directives.

a. <u>Northern Goshawk</u>. The Appellants suggest that the Project is logging goshawk nest stands. That simply is not the case. The effect of the Project and the stringent Standards to protect goshawks are discussed above.

Appellants suggest the USFS will not follow its own regulations, pointing to previous impacts on goshawks elsewhere. Applts. Brf. at 28-29. The Eighth Circuit has long held that it will not assume that government officials will violate

the rules they are governed by and that such issues are ripe only when or if such violations occur. *Ford v. Boeger*, 362 F.2d 999, 1008 (8<sup>th</sup> Cir.1966); *Miller v. Wilkes*, 172 F.3d 574, 579 (8<sup>th</sup> Cir.1999) ("we will not assume the worst" and invalidate a policy on the grounds that it might be misapplied).

Further, Appellants' claims of goshawk disturbances are overstated both as to the extent and cause of such disturbances. Appellants magnify the extent of such disturbances by using the terms "nest stands" and "territories" interchangeably. A territory consists of 2-6 nest stands. JAA 674. An effect on a single nest stand is not an effect on a whole territory. Not all nest stands are active; not all territories are active. The fact that nest stands and territories were inactive on the day they were surveyed does not mean they were absent from the territory. AR-N13478. Birds may have built a new nest in the same territory that has yet to be identified. *Id*.

Goshawks leave nests from time to time for all kinds of reasons, not just logging. The causes include fire (AR-N13478), wind damage and predators (AR-N10119-N10121) and nest age. AR-N13478. The cited surveys show, for example, a new nest about 30 meters from an active site and no reference to logging (AR-N10099), and nests that had actually been buffered (i.e., no logging near the nests) when a treatment had occurred. AR-N10135.

Appellants argue over scientific recommendations for goshawk foraging habitat. Applts. Brf. at 30. Goshawk forage habitat is different from nesting habitat. JAA 317; AR-N10053. All aspects of goshawk habitat were not only considered in this Project, but also in Phase II. *See* discussion *supra*.

Appellants claim the USFS requires foraging habitat of large trees "structural stages 4B, 4C, and 5" and recommends that at least 40% of goshawk territory be comprised of these habitats." Applts. Brf. at 30, line 4. This is not a USFS requirement at all. The reference is to a statement by a scientist made during prior forest planning. AR-N02393. The USFS has found, based on BHNF study and research that Goshawk foraging habitat is not limited to late successional pine, but occurs when prey is found and varies by region, season, and availability. JAA 317. The goshawk is a "forest generalist species." *Id*.

Appellants also refer to "current science" based on a 1992 publication from the southwestern United States. AR-N04667. The publication itself states that forage needs depend on the specific forest and its findings are only recommendations. AR-N04678. A different forest is involved in the Preserve.

The decision on the proper percent of forage is a technical decision best made by USFS decision makers. *Central South Dakota Coop. Grazing Dist.*, 266 F.3d at 894-895; *Sierra Club*, 259 F.3d at 1289.

Finally, the State GFP assisted in designing treatments for the ultimate best effect for game animals and birds. As the State agency entrusted with the protection of wildlife, the GFP would not support or be part of a treatment project that would cause harm or allegedly destroy habitat for any species, much less game animals and birds.

# b. <u>Black-backed woodpecker</u>.

Because black-backs can be associated with high populations of MPB, an increase of preferred habitat will occur regardless of the Project. JAA 321-322. Trees killed by fire, insects, and diseases (snags) serve as vertical structures for nesting and habitat for insect food sources. *Id.* Black-backs also nest in live trees with diameters of 9-18 inches. JAA 321.

Black-backs thrive in the early stages of MPB infestations (JAA 322-324) like that occurring in the greater Black Hills. Habitat for black-backs is relatively abundant and increasing. JAA 322. Current snag density exceeds habitat needs and now is a good time to be a black-backed woodpecker in the Black Hills. JAA 258, 324.

Although Appellants claim a high mortality rate of pine in structural stages 4B, 4C and 5, such trees are not necessary to sustain viable populations of blackbacks, that is not the case. They are capable of sustaining populations in other habitats. JAA 321.

Moreover, insect-killed pine (soft snags) last for only about 5 years<sup>21</sup> before they snap, topple over and no longer provide wood-boring larvae as a necessary food source. JAA 727 (scientific research on longevity of shags specific to the Black Hills). Because of the ephemeral nature of these snags, the Project should be managed to provide resilient and sustainable sources of habitat through time. Otherwise, little habitat and food resources (wood-boring insects) would be available for black-backs in future decades. Project implementation and completion should be done as designed to stay ahead of the current MPB spread, ensuring there will be residual and resistant mature trees that survive to become eventual snags.

It would be a violation of NOA to tip the management scale towards increasing habitat for one species like the black-backed woodpecker (when that bird has abundant habitat right now - JAA 322) to the detriment of other game animals and birds. The Project treatments are necessary to minimize that situation. JAA 178 (ROD). Without treatment, the resilience and sustainability of pine and spruce forests will be negatively impacted. JAA 178-179.

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<sup>&</sup>lt;sup>21</sup> Snags killed by other methods may stand longer (TR 88) and the median age of snags in the BHNF is 15 years. JAA 725.

### c. <u>Brown Creeper</u>.

As stated above, brown creepers occupy mature old-growth conifers and mixed coniferous-deciduous trees, including white spruce. JAA 310. MPB mortality in late successional and old-growth pine would eliminate most of these pine stands or significantly alter the structural stage to an earlier, less dense configuration by 2020 and the "no action" alternative could result in a decrease in habitat and displacement of individual brown creepers from the Preserve.

JAA 311. Instead, the Project would thin various sizes of pine trees, reduce loss of MPB-killed trees and, most importantly, enhance live large trees, late succession, and spruce, thereby enhancing brown creeper habitat now and into the future.

JAA 166, 313.

- 4. <u>Compliance with NOA habitat requirements</u>.
- a. <u>Understory</u>. Appellants argue that the Project removes "crucial" understory<sup>22</sup> on 3,600 acres. Applts. Brf. at 35-36. Appellants do not define "crucial" understory vs. "understory" and, further, do not indicate what type of understory is at issue. Presumably the Appellants would reject any type of

<sup>&</sup>lt;sup>22</sup> Understory is "the lowest layer of vegetation in a forest or shrub community composed of grass, forbs, shrubs, and trees less than 10 feet tall" and is also defined as "vegetation growing under a canopy. JAA 516.

proposed treatment (thinning, logging, and/or prescribed fire) whatsoever.

Appellants' arguments should be rejected.

First, Appellants have the facts wrong. Not every acre is being treated.

Understory is already completely lacking in many stands, and is now primarily composed of immature pine, not a mix of lush shrubs, forbs, grasses and immature trees.

Second, the Project will remove some pine understory in pine sites, but when it does the removal will enhance habitat for game animals and birds. A total of 115 acres (not contiguous) of *pine* understory will be removed in *pine sites*; 39 treated acres are to improve mountain goat habitat. JAA 175-176. Mountain goats reside in the high peaks above the timberline and not in known master habitats. AR-N10042-N10046. Regardless, the marten cannot be preferred over mountain goats. The mountain goat is a game animal; the marten is not.

Third, the Project will remove encroaching pine in hardwood areas and benefit game animals and birds that depend on and use hardwoods. Pines will be removed in 594 acres of hardwood, allowing hardwood to grow better. JAA 175-176 (referring to this as hardwood releases). This will enhance habitat for ruffed grouse, turkey and other species (including prey for the Northern Goshawk). *Id.* 

Fourth, encroaching pine will be removed from meadows or riparian areas on 271 acres. JAA 175-176. These are not areas of pine habitat; they are areas

where pine is encroaching on meadows and riparian areas (i.e., habitat for song sparrow, a species that Appellants advocate for).

Fifth, Appellants' "understory" claims include concerns about the sharp-shinned hawk, flammulated own, northern saw-whet owl. Claims concerning understory for these species do not appear to have been previously raised. The Appellants failed to exhaust understory claims regarding these species and such claims should be disregarded. *Central S.D. Grazing*, 266 F.3d at 901.

Sixth, the Appellants would manage "understory" for marten (a weasel), at the expense of habitat needs for game animals and birds. This would violate NOA. Even so, marten habitat will benefit since spruce stands will not be cut or burned in the Project. AR-N10042-N10046. The Project will remove competing pine and give spruce an advantage. JAA 172. The project will defer treatments along Iron Creek (JAA 182) where a single marten was once observed. Design criteria includes considerations for coarse woody debris used by marten (JAA 525).

# b. <u>Future Snags</u>.

Appellants argue the Project will remove "future snags" for nesting and breeding habitat. The term "snags" refers to dead trees that remain standing.

JAA 514. Appellants arguments pertain to "future snags" alone; existing snags are not targeted (unless they are a safety concern). JAA 323.

The Appellants are correct in stating that the "no action" alternative would create the most future snags, but MPB-created snags are ephemeral and remain vertical for only up to 5 years, as discussed *infra*. The Project, as adopted, will still allow for sufficient MPB-created snags in the Preserve for nesting and breeding habitat. That is because not all areas will be treated and not all trees (dead or alive) will be cut or removed. JAA 175-176, 182-183. In particular, the BEW will not be subject to treatment and there will be live trees (future snags) and current snags. JAA 171, 177.

The Appellants ask the Court to further enhance the expansion of MPB, increase the number of MPB-created snags, and essentially have the majority of the entire Project area set back to the snag and early successional vegetative stage. Rather than a forest and multiple watersheds of MPB infested snags, however, the USFS has reasoned that it is better for game animals and birds to manage the forest for all their required habitat needs, including not only snags but also resilient live trees that will survive the infestation to eventually become snags (both short-term soft and long-term hard snags) in the future as the forest cycle continues. JAA 179-181.

### 5. White-tailed Deer and Elk Habitat.

The Preserve's dense forests compete for sunlight and have choked out understory vegetation, invaded riparian areas, hardwood stands and meadows

which provide habitat and nutritious food for elk, white-tailed deer, mountain goats and other species. JAA 166 (ROD). The MPB is currently on the verge of significantly changing vast stands of pine and spruce across entire watersheds in the Preserve. The FEIS addressed habitat needs for big game and the USFS consulted with the State because current habitat conditions in Norbeck are less than desirable for deer, particularly in terms of providing for seasonal needs. JAA 300-301. The Project enhances shrub, hard wood, and meadow habitat for big game by removing encroaching pines. JAA 175. It provides for forage. *Id.* The Project will decrease the likelihood of forest fires that are detrimental to big game. For these (and other reasons stated *infra*) the Project enhances big game habitat.

Even the projected temporary effects are diminished since the ROD ultimately barred mechanical treatments during the birthing and rearing season (March 1 - July 31). JAA 182. Prescribed burning will have seasonal limits and, importantly, will be directed by wildlife biologists. JAA 529.

#### a. Thermal Cover.

For the BHNF thermal cover is defined as:

cover used by animals to ameliorate the effects of weather. Optimally, thermal cover is provided by a stand of coniferous trees, 30-60 acres in size, at least 40 feet tall, with a canopy cover of at least 70%. South of Highway 16, thermal cover may be provided by shorter trees, due to poorer site indices.

AR-N03644-N03645. The Forest Plan provides a thermal cover objective of 30% of the planning unit for big game, including elk and deer. <sup>23</sup> JAA 218. This is an objective, not an immutable requirement. An "objective" is a "concise statement of desired measurable results intended to promote achievement of specific goals. Attainment of objectives is limited by the application of standards and guidelines." JAA 510.

Thermal cover was reviewed in 2003 for the Phase II Amendment.

JAA 699. The State supported a *combination* of hiding/thermal cover on at least 30% of timber sale areas (JAA 718), and recommended shrub and forb habitat be maintained and enhanced as components of that cover. JAA 709. Shrubs can provide hiding/thermal cover. JAA 706-707. Hiding cover is discussed *infra*.

As result of these comments and other analysis<sup>24</sup> the 2003 review stated that "elk thrive in some areas with no thermal cover, but are better able to cope with heat constraints with adequate thermal cover." JAA 717. Current expert studies

<sup>23</sup> BHNF Forest Plan Objective 5.4A-210. Provide wildlife cover and forage. Provide thermal cover for big game on at least 30 percent of the planning unit.

Manage for to 10 percent of each 640 acres in 1-to 10-acre openings to provide

forage. AR-N03538

The 2003 review cited independent research at Custer State Park. Millspaugh, et al. 1998. Summer bed sites of elk (Cervus elaphus) in the Black Hills, South Dakota: considerations for thermal cover management. American Midland Naturalist 139:133-140). See Doc. 45-1, Attach 1.

also show that "thermal cover does not significantly improve the energetic status and productive performance of elk." JAA 742. Custer State Park research shows forage is three times more important than thermal cover. JAA 742. In other words elk use thermal cover when available, but is not a necessary habitat component for animal or herd health.

During 2007 Project planning the State commented that more information was available about thermal cover than in the past and questioned the thermal cover objective for planning units, stating "thirty percent is not necessary since this area is not primary winter range for deer. Elk require more summer thermal cover than winter." AR-N04292. Appellants exaggerate the thermal cover issue as a biological need and ignore current science specific to the Black Hills. Even the reference cited by Appellants acknowledges the science on this issue has changed. JAA 759.

The 2003 review also found that uniform application of cover recommendations is not appropriate. JAA 700. Patterns used by elk for cover (and forage) vary daily and seasonally and with the climate. JAA 716. These variables differ across elk country and within geographical areas. *Id.* Within-stand diversity and heterogeneity, such as differing forest structures, distribution of trees, type and quantity of understory affect the features elk will use. JAA 717, 743. The analysis

should include not only pine trees, but also available shrubs. AR-N16011-N16012. A one-size fits all approach is not biologically necessary.

The significant MPB impact on pine and spruce cannot be ignored.

Treatments to assist conifers in becoming more resilient to MPB will provide for some thermal cover now and provide for the most rapid recovery long-term for future cover. Despite Appellants' claims, MPB itself would make the most significant change to thermal cover, not the Project.

### b. <u>Hiding Cover</u>.

The Preserve offers habitat characteristics for elk unlike other areas in the Black Hills with low numbers of open roads for motorized vehicles (see density argument below) and few permitted livestock.<sup>25</sup>

Appellants claim there is insufficient hiding or security cover. Applts. Brf. at 43. Security cover provides visual obstructions between animal and predator and/or human. JAA 743. It enables elk to feel safe and perceive risk. *Id.* Security is important in high disturbance areas and during hunting season. JAA 717. MPB would diminish pine and spruce cover greatly if left unchecked, but the Project treatments will create resilience to MPB and provide some cover now and allow

<sup>&</sup>lt;sup>25</sup> A separate grazing plan provides for elimination of the grazing allotments over time. TR 78.

for future cover (rather than vast acreages of downed and toppled pine which is not useful cover).

Hiding cover for both deer and elk is provided not only by boles in mature trees, but also by horizontal obstruction provided by shrubs and by non-vegetative features such as topography. JAA 700, 717, 743.

Appellants rely on *Hillis*, et al., a study of a Montana area that experienced "elk populations and hunter numbers at 30-year highs" and a corresponding decline in bull/cow ratios. JAA 760. The hunting season in that area had been "relatively unregulated." *Id.* There were high densities of open roads. JAA 762-764.

The situation in the Preserve is not comparable. South Dakota's elk hunting regulations are restrictive. Licenses are issued by lottery and the Preserve is in a management unit that allows only 10 elk licenses. ARSD 41:06:26:02(17), ARSD 41:06:26:04. Those who receive licenses are not eligible to participate in the lottery again for nine more years. ARSD 41:06:26:04. Few licenses are issued compared to the interest the State receives. Doc. 45-4, p. 5.

While the Preserve is part of a hunting unit, hunting is more accessible via motorized vehicle elsewhere in the BHNF due to fewer roads in the Preserve JAA 300. Motorized travel is limited to the main Norbeck system roads and overall use is very low. JAA 446. In fact, "most low-standard roads are permanently closed to provide wildlife security." AR-N09891 (Wildlife Specialist

Report). These areas often are gated or have signage showing they are closed and the paths are being reclaimed by native plant species including trees. *Id.* To the extent there are roads, hunters cannot hunt (shoot) from them. SDCL 41-8-37, SDCL 41-9-1.2. The Project does not call for more permanent roads and the means to reach hunting areas via motorized use is not increased.

The *Hillis* article warned against applying its conclusions elsewhere, stating that "unquestioning adherence to these guidelines may lead to serious misapplications and should be avoided." JAA 762.

Appellants further rely on *Hillis* to urge creation of "large blocks of cover at least 250 acres in size." There is no such USFS or NOA requirement. Appellants argue that hiding cover consists only of mature trees. The Forest Plan guideline provides for "big game screening along at least 20 percent of the edges of arterial and collector roads." JAA 526. It also suggests using "vegetation, slopes, landforms, etc., in evaluating available screening." *Id.* For the Preserve, the landforms alone meet the guideline. *Id.* The Preserve has a high degree of rugged granite formations. AR-N09890.

The Project provides for additional cover by enhancing small vegetation structure, variable vertical and horizontal vegetation and objects (tree stems of live and dead trees, shrubs) to break up or camouflage the outline of the animal.

JAA 700, 717, 753. For example, the Project will leave pockets of small diameter

pine in specific areas and adjacent to system trails where humans may walk.

JAA 527. Project biologists have targeted areas where possible human

disturbances to big game will be lessened by leaving these visual obstructions and biologists will be directly involved in all aspects of implementation. JAA 527.

The Project silvicultural treatments in multi-aged stands are designed to retain variable and heterogeneous habitat structures which serve these purposes for other game animals and birds, not just elk. JAA 183.

The USFS made a reasoned analysis based on the evidence submitted and considered scientific evidence relevant to the decision at hand.

Critically, the Project treatments are not going to be the cause of decline in elk attributes favored by the Appellants. The projected MPB mortality to pine must be factored into the overall projected acreage conditions by 2020 (cumulative effects) JAA 285-290, 325-326. Even without project treatments, the elk habitat attributes that Appellants advocate (standing mature trees), will not be available post-MPB.

# c. <u>Road Density</u>.

The State itself has stressed minimal road construction in the Preserve (AR-N00127) and agrees road density is a consideration, but the Appellants claims are outlandish.

First, while Appellants use the term "habitat effectiveness," with respect to road density, the term refers to a type of modeling not used on the BHNF. This modeling is supposed to predict elk habitat by rating it based on various metrics (i.e., roads, landscape features like riparian habitats, spatial relationships like land ownership patterns, adjacent activities, and domestic livestock) JAA 757-759. HE modeling was used in 1980's forest planning in Region 1 (including Montana and Idaho) where forests were adjacent to each other and lacked "cohesive direction identifying a common set of elk management standards . . . and resulted in adjacent forest having startling different goals, objectives, standards, guidelines and terminology." JAA 757.

In Phase II planning BNHS scientists found this modeling was not scientifically sound for the BHNF, and recommended that it not be used as a primary decision-making tool unless and until new models were calibrated and validated for use on the BHNF (i.e., adjusting the model and confirming that the wildlife is surviving and reproducing in the habitats as predicted by the modeling). JAA 700. There are few models that sufficiently evaluate forest management strategies at levels that incorporate temporal and spatial trends in forest growth and they may cause short term reductions in implementing long term planning. *Id.* The best use of such modeling is for only an informational purpose, so field data collection and "professional judgment must be incorporated into management

decisions effecting deer and elk populations." JAA 701. Phase II did not use adopt HE modeling and it was not used in the Project planning.

Second, the average density of all BHNF system roads is 4.4 miles/ sq. mile. JAA 470. Density of USFS roads open to motorized travel in the Preserve is 1 mile/sq. mile. *Id.* Many historic travel corridors for mining or logging have been closed. *Id.* There is no information on how the Appellants calculated road density, but they appear to remove the BEW from the calculations to inflate the road density claims. BEW should be included in calculating density; it is part of the Project planning acres (JAA 164), no motorized travel is allowed (AR-N03446), and game animals will continue to use BEW regardless of the Project.

Third, no new system or permanent roads will be added. JAA 176. Roads currently closed to the public will remain closed. Appellants argue that there will be an increase of about 18 miles (Applts.Brf. at 45), but the actual sum is one mile of new road and it will be temporary. JAA 176. The rest of the road work will involve maintenance and reconstruction of existing roads and. JAA 472. At most, up to 4.42 miles of existing trails will be temporarily converted for use as roads. *Id.* Temporary roads for timber hauling will not be available for public motorized use and will be closed after project completion. JAA 471. The project would have converted another 1 mile of trail (Iron Creek Trail #15) to temporary road, but that idea was abandoned in the final decision. JAA 182-183.

Fourth, temporary project roads will not significantly negatively affect elk. The Project treatments will not occur all at once. Appellants refer to an FEIS statement indicating there may be temporary disturbances to individual elk (JAA 304), but the ROD modified this aspect of the Project restricting the season for mechanical treatments to August 1-February 28. JAA 181-182. That will avoid project traffic on temporary trails and roads during elk calving season. *Id*.

Fifth, Appellants rely on parts of a study regarding road density. Yet, the study itself, states that not all roads are equal and effectiveness on summer elk range will vary depending upon road construction standards, whether they are open to public use, traffic levels, maintenance levels and closure methods i.e. that density itself is not dispositive. JAA 758 (Christensen study). Appellants' calculations to not factor these differences into their equation.

Sixth, road density alone is not a valid descriptor of elk habitat. Elk are known to adapt to roads already open to the public. JAA 743. Several studies including those conducted in Custer State Park demonstrate road type and activity level are the primary components in determining the influence of roads on habitat. JAA 743. In Custer State Park areas near tertiary roads (roads closed to the public but occasionally used for administrative purposes) were actually used by elk more often than random, suggesting elk preferred to use areas near these types of roads. *Id.* 

In sum, Appellants have not demonstrated that the well-being and population of this high-demand game animal in Norbeck would be harmed or violate NOA.

Indeed, the State would never have agreed to vegetation treatments that would jeopardize elk populations or a significant decline in elk numbers such that opportunities for humans to enjoy this species would be diminished.

### 6. <u>The USFS Guidelines and Objectives.</u>

Although not a NOA issue, Appellants claim the Project ignores or violates Guidelines and Objectives in the 1997 BHNF Forest Plan. Applts. Brf. at 45-46. The Forest Plan was created under NFMA. *Sierra Club* 259 F.3d at 1285. It was amended in 2006 (Phase II Amendment). AR-N03275.

Under the Forest Plan, Guidelines are "preferred or advisable courses of action; deviations from guidelines are permissible, but the responsible official must document the reasons for the deviation." JAA 508 (FEIS Glossary); AR-N03606 (Phase II Amendment). To the extent deviations were made for the Project, they were documented and the rationale for doing so is to protect game animals and birds. JAA 187-189.

Appellants claim certain Objectives were not met. As discussed *infra*, a Forest Plan Objective is a "statement of desired results" (JAA 510) and is a planning tool. Objectives are not standards. Moreover, conditions currently beyond the control of the USFS like climate, fire, or insect infestation can

obviously impair the ability to reach such Objectives. Regardless of the reason for any deviations, neither the Guidelines nor the Objectives are rules or statutes and they are not enforceable as such. These are not valid reasons to reject the present Project.

III

#### THE USFS DECISION IS SUPPORTED BY THE RECORD

Appellants argue that MPB will improve wildlife habitat and the Project will harm it. This is a judgment call. The agency has made an informed decision among competing scientific views and management views and its' analysis is entitled to deference. *Central South Dakota Coop. Grazing Dist.*, 266 F.3d at 894-895. The issue "is not whether there might have been a better way for the agency to resolve the conflicting issues with which it was faced, but whether the agency's choice is a reasonable one." *Id.* at 899 (citing *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 535 (8th Cir.1998)).

# 1. <u>Focus Species</u>.

Appellants claim the record is "full of evidence" showing the benefits of MPB on Focus Species and cite to snippets culled from the FEIS. Applts. Brf. at 40. Appellants' claims should be rejected.

a. <u>Bighorn Sheep</u>. Appellants cite to part of a sentence in the FEIS that MPB would make habitat "more suitable" and bighorn sheep would stay

in the area longer. AR-N08723. This half-sentence begs the question—more suitable than what? The statement is that MPB would provide more suitable habitat than currently exists-- due to infested trees dying and forage areas opening up. JAA 298. The Project will, together with the MPB, open pine stands for foraging, traveling corridors, and cover and it "may improve habitat enough to provide the opportunity for a population increase." JAA 299. This is not an admission that the "no action" alternative is best or that that the alternative chosen is arbitrary. Indeed, the analysis was not made "off the cuff"---bighorns have been analyzed repeatedly since they are not only a Focus Species under NOA, but are also R2SS and SOLC under NFMA. The bighorn was analyzed in Phase II (JAA 299), is consistently monitored (JAA 298), and was subject to scientific review in the present Project. AR-N10046-N10051 (BA/BE). The local and relevant science gained was used in the Project analysis. *Id.* 

The USFS and the State are concerned about bighorn populations due to diseases and die-offs and the State GFP experts contributed to this analysis.

JAA 297-298. To suggest that the State or USFS would intentionally put this species in harm's way is absurd. Appellants point to no real evidence to support the high burden they bear.

b. <u>Other Focus Species.</u> Other than bighorns, all of the focus species referenced by the Appellants are discussed above in other issues. The

benefits of the Project were discussed. This section is another example of using snippets out of context. In large part, the statements do indicate benefits from the MPB at some level, but the review indicates that positive benefits from the MPB are enhanced and/or outweighed by the Project. For example, the aspen habitat and open areas for ruffed grouse would benefit if there were fewer encroaching pine trees whether caused by MPB or mechanical treatment, but the alternative chosen would provide the most such habitat. JAA 314-315. The same is true for the riparian habitat used by the song sparrow. JAA 316-317. Again, Appellants point to no real evidence to support the high burden that would be required to overturn the USFS decision.

#### 2. Other wildlife.

Appellants argue that at least 14 various species would benefit from continued MPB infestation because these species use cavities or fallen snags. Applts. Brf. at 50. Of the species at issue, several are non-game animals not protected by NOA: American marten (a weasel), five types of myotis (bats), and the northern flying squirrel. The USFS is to manage the Preserve for "game animals and birds" under NOA; it cannot subordinate game animals and birds to these other species. *Sierra Club*, *259 F.3d at* 1285.

Of these non-game animals, four of the five bat species are not found in the Project area. JAA 339, 366-373. As for the other bat (fringed myotis), *see* 

JAA 375-376 (FEIS); AR-N010036-N010042 (Wildlife Specialist Report). *See also*, JAA 370-371 (northern flying squirrel). The pine marten is discussed *supra*.

Appellants also list birds, including the pygmy nuthatch and black-backed woodpecker. They are discussed *supra*. The others are the flammulated owl, Lewis woodpecker, American three-toed woodpecker, red-headed woodpecker and northern saw-whet owl. The flammulated owl and the three toed woodpecker are not even in the Project area. JAA 376. For USFS review of the other species listed, *see* JAA 356 (Northern saw-whet owl); JAA 379-380 (red-headed woodpecker); AR-N10060-N10063 (Lewis woodpecker). The USFS found that the Project will be consistent with their habitat needs.

Despite Appellants' claims, the USFS analyzed game animals and birds from each type of habitat present in the Preserve and reviewed each species category required under NFMA and it found the Project to be appropriate.

Appellants essentially argue that the USFS should analyze seasonal, micro-site habitat characteristics at a quantifiable level for breeding and rearing for all species whatsoever. Such intense review is not required.

# 3. Record Support for Mountain Pine Beetle Predictions.

Appellants dispute the conclusions USFS had drawn from its MPB data. It is the USFS, however, that is entitled to assess the facts and develop the decision

based on those facts. *Central South Dakota Coop. Grazing Dist.*, 266 F.3d at 894-895.

USFS entomologist Kurt Allen analyzed the consequences of the "no action" alternative in 2009. JAA 612. As described in the Statement of Facts, he concluded that, "based on the amount of currently infested trees present, this type of mortality is going to continue to increase and spread through the project area." *Id.* The USFS decision maker reviewed the data and accepted this analysis (and that of USFS silviculturists), concluding that "projections by USFS entomologists and silviculturists regarding the MPB infestation represent a realistic projection of future habitat conditions in the year 2020." JAA 178.

a. The "circular logic" argument. Appellants claim the Project will provide "no current benefit," will "kill and displace wildlife," and that planning for the future is illogical. Applts. Brf. at 52. The Appellants are wrong. The Project provides both current and future benefit, as is shown throughout the ROD. *See*, *e.g.*, JAA 172-174. Further, the FEIS lists several species, weighs the benefits, and makes its abundantly clear that there will be both current and future benefits to a range of game animals and birds. JAA 253, et seq. USFS biologists and other expert scientists prepared thorough Project reports. AR-N09887 (Wildlife Specialist Report); AR-N010020 (BA/BE).

The inescapable fact is that experienced scientists have concluded that more trees will, in fact, be left intact when the project moves forward than would be left in the wake of a continued massive MPB infestation. Appellants scoff, arguing that the Project maintains "only 1856" trees or 1 tree per acre. But the actual facts are that there will be 1,856 more *acres of pine sites in a mature condition likely to survive the MPB outbreak* (not 1,856 individual trees) than if the Project did not go forward. JAA 250. The no action alternative would leave 7,868 acres; Alternative 4 would leave 9,724 acres. *Id*.

Based on Appellants arguments, they would throw away the benefit of treatments (saving 1856 acres) to further their cause. Yet at the Preliminary Injunction hearing they argued that removal of even fewer acres of trees (160 acres) would seriously impair habitat. TR 125, 130 (arguing against logging 160 acres consisting solely of dead and dying trees). *See* Addendum. That is circular logic.

Appellants also postulate that "the agency failed to address where and how the displaced focus species in the Preserve will survive until the dense forests can re-establish them." Applts. Brf. at 53. This assertion ignores the FEIS and the extensive analyses performed by experienced biologists who have concluded that the Project will protect species of game animals and birds. The species needs were fully addressed, as set forth *supra*.

Ultimately, the same question might be asked regarding displacement due to MPB. And the answer is that if a natural disturbance such as MPB changes complete watersheds, species survive if they can find unoccupied habitat elsewhere, a basic biological precept. The Project will, however, keep the game animals and birds in the Preserve, thanks to dedicated scientists who have developed detailed plans specially tailored for the NOA game animals and birds.

## b. Appellants "saving old growth" claim.

Contrary to Appellants claim (Applts. Brf. at 53) the USFS has not claimed that "MPB will kill all the large mature trees in the Preserve." MPB will cause vast mortality of large trees. Entire *stands* that currently contain late-successional and/or dense trees >9 inches dbh (classified as structural stages 4B, 4C and 5) could be significantly altered to 4A, 3A, 3B or lower in size with corresponding diminishment in overhead density, as discussed in the FEIS. JAA 263, 289.

The USFS used experienced entomologists and silviculturalists who conducted field surveys specific to the Preserve and analyzed the MPB growth in the Preserve over a period of years. JAA 603-620. As one of them found, "it is easy to envision that many of the areas that are forested at this point could easily lose most or all of their mature pine overstory" due to MPB alone. JAA 614. In 2009 and 2010 the infestation rapidly expanded in the Preserve. Doc. 27-5. In 2010 there were five times more green infested trees of all size classes than were

killed in 2009. *Id.* The infestation is not done. The earlier predictions are becoming reality. The reasoned analysis of these scientists is entitled to deference. *Central South Dakota Coop. Grazing Dist.*, 266 F.3d at 894-895.

#### c. Beaver Park claim.

Appellants argue that the USFS ignored data showing that the MPB infestation at Beaver Park was less than predicted. Applts. Brf. at 55. Appellants overstate the USFS analysis, making it sound more dire than it was, so as to claim the facts did not live up to such dire predictions.

The infestation at Beaver Park was, by any standard, very serious. It was such that the area was likely to result in fires that would cause additional risk to the forest and to the watershed used for the Sturgis municipal water supply. It took an act of Congress (Section 706) to implement USFS treatment of this situation. The extent of the infestation was not overestimated. And even if it was, that does not show the USFS is wrong now.

The USFS considered MPB experience throughout the BHNF. JAA 603-620. Based on Beaver Park and other situations, the USFS has experience and knowledge with which to base predictions. In 2007, a USFS study compared the MPB infestation in the Project area with other earlier BHNF infestations (including Beaver Park) and concluded:

Mountain pine beetle is at outbreak proportions in the Norbeck area. Significant changes on the landscape have already occurred and these

changes will continue to occur into the future. In ponderosa pine in the Black Hills, it was estimated that 80% of susceptible trees had been killed in portions of the Bear Mountain area in the 1980's and 1990's (citations omitted) and 100% of susceptible trees had been killed in some stands in Beaver Park area in the late 1990's through 2000 . . . The final totals for mortality in Norbeck have already equaled or surpassed the 50% level in moderate or high risk stands, some reaching 100% mortality and the mortality is still growing and expanding.

#### JAA 609-610.

While Appellants claim that the USFS "refused to consider" Beaver Park, they are really complaining that the USFS should not have relied on USFS knowledge and experience and should have deferred to Appellants unique view of Beaver Park. The USFS did not disregard its own analysis in the Preserve and elsewhere on the BHNF.

#### d. Black Elk claim.

There was a 3-fold increase in MPB over a two year period in 2004-2006 in the BEW. JAA 607. By 2007, portions of the BEW already had 100% of the overstory killed and the same level of mortality was expected to continue.

JAA 610. By 2009, pine beetle was pervasive in the BEW and had killed various types of trees. JAA 612-614.

Appellants claim that the MPB infestation in BEW had caused the dense stands in the BEW to "only decrease from 87% to 57%" in 2009 and the results in the Project area would likely mirror that result if the MPB is left unchecked.

Applts. Brf. at 55. It is undeniable that based on the high degree of infestation and

the rapid expansion of beetles, a landscape altering change in vegetation is occurring over a short period.

It is even more dramatic when considering the size of the trees referenced. Appellants 57% reference shows the total remaining dense pine in 2009 for structural stages 3B, 3C, 4B, 4C and 5. JAA 220. The structural stages 3 category includes saplings. JAA 515 (structural stage definitions). Yet, the stands likely to experience nearly complete pine beetle mortality are the densest stands and largest trees (stages 4B/4C/5) and they comprise much of the BEW. JAA 612-613. Not every tree will die in all stands. The classifications could probably change to one of smaller and less dense trees in areas where not all the trees die. Based on the review of the MPB behavior over time and the types of trees pine beetle are prone to infest, the 2009 review concluded that there would be a few remaining pockets (< 5 acres) of these large dense trees left in the BEW once the infestation passed. JAA 613. The analysis found that post-MPB movement, the residual and remaining structural stage (which measures both tree size and density) would primarily be SS 4A. *Id*.

The Project area outside the BEW has the same type of structural stages as the BEW. JAA 614. As stated by the Appellants, the Project area "contains similar large contiguous stands of older ponderosa pine forests." Applts. Brf. at 55. The USFS obviously considered the BEW experience (JAA 610) as well as

other MPB experience throughout the BHNF. The conclusions reached by the USFS are well supported by the record.

#### **CONCLUSION**

Based on the foregoing arguments and authorities, the State asks that the District Court opinion be affirmed.

Dated this 7th day of July, 2011.

Respectfully submitted,

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#### CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in Rule 32(a)(7) using times new roman typeface in 14 point type. Appellee's

Brief contains 13,808 words.

2. I certify that the word processing software used to prepare this brief is

Microsoft Word 2010, and it is herewith submitted in PDF format.

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Dated this 7th day of July, 2011.

/s/ Diane Best

Diane Best

**Assistant Attorney General** 

#### CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Diane Best

Diane Best

**Assistant Attorney General**